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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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# No. 400

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CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, AND EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION,

*Appellants,*

*vs.*

GEORGE P. ALDERSON, STATE TAX COMMISSIONER OF WEST VIRGINIA.

---

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

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## STATEMENT AS TO JURISDICTION.

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*vs.*

GEORGE P. ALDERSON, STATE TAX COMMISSIONER OF WEST VIRGINIA.

---

## STATEMENT AS TO JURISDICTION.

---

The appellants below, and appellants here, having this day presented their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and to exercise jurisdiction in this case.

I.

## The Statutory Provision Believed to Sustain the Jurisdiction.

Section 237(a) of the Judicial Code, 28 U. S. C. A. Section 344(a), provides, in part:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error (appeal). The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Without reciting at length in this part of the statement the numerous cases wherein this Court has decided that there is a federal question involved when there has been a systematic and deliberate undervaluation of the properties of many taxpayers by state officials, either pursuant to state law or upon their own volition, we set out hereinbelow briefly but a few of those in which the matter has been heard in the Supreme Court of the United States by means of direct appeal.

The cases set out hereinafter in the argument part of this statement are all upon a question similar to that presented here, and the Supreme Court of the United States has held innumerable times that a federal question is involved. See, *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78; *Coulter* v. *Louisville & N. R. Co.*, 196

U. S. 599, 49 L. Ed. 615; *Chicago B. & Q. Ry.* v. *Babcock*, 204 U. S. 585, 51 L. Ed. 636; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 62 L. Ed. 1154, writ of error to State Court, i. e. appeal.

The latest pronouncement of this Court was in the opinion decided May 29, 1944, in the cases of *International Harvester Company and the Indiana Mining and Manufacturing Company* v. *Wisconsin Department of Taxation*, 12 U. S. L. W. 4428.

Mr. Chief Justice Stone, in delivering the opinion of the Court, stated, in part, in the opening sentence of the opinion: "These cases come here on appeal under Section 237(a) of the Judicial Code, 28 U. S. C., Section 344(a), from judgments of the Supreme Court of Wisconsin, reviewing and sustaining assessments by appellee, the Wisconsin Department of Taxation, * * *."

Where the validity of the general laws of California, 1937, Act 2964, Section 10, as construed by California courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, a judgment of the Supreme Court of California was properly before the United States Supreme Court on appeal, under Section 344, Title 28, U. S. C.

## II.

**The Statute of the State, the Validity of which Is Involved.**

The statute, the validity of which is involved, is Michie's Code of West Virginia, 1941, Chapter 11, Article 3, Section 14(a), as amended by Chapter 118, Acts of 1939, enacted by the Legislature of West Virginia, set out in full in the Appendix hereto, which in effect provides that the capital of every building and loan association or federal savings and loan association, as represented or evidenced by the investment shares and investment accounts, "shall

be assessed at its true and actual value according to the rules prescribed by this chapter," and "the real and actual value of such capital, represented by the market value of such investment shares and investment accounts as aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain * * *." There is also involved the statute of West Virginia, which is Michie's Code of West Virginia, 1941, Chapter 11, Article 3, Section 1, the main and substantive part of which is as follows:

> "All property shall be assessed annually as of the first day of January, at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale * * *."

There is also involved the Constitution of West Virginia, Article X, Section 1, set out in full in the Appendix hereto, which provides, in substance:

> "* * * Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. *No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.*" (Emphasis supplied.)

This said Article X, Section 1, known as the "Tax Limitation Amendment," was ratified by the people of West Virginia in November, 1932, and further provides for the property to be divided into four classifications, with a tax limitation or ceiling upon each class.

In Class I is personal property employed in agriculture, the products of agriculture, including live stock, owned

by the producer, and "money, notes, bonds, bills and accounts receivable, stocks, and other similar intangible personal property."

Class II includes "all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants."

Class III includes "all other property situated outside of municipalities."

Class IV includes "all other such property situated within municipalities."

There is also involved the 14th Amendment to the Constitution of the United States, Section 1 thereof, and specifically the last sentence, providing: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; now deny to any person within its jurisdiction the equal protection of the laws."

## III.

### The Administrative Orders Involved.

On June 24, 1941, George P. Alderson, State Tax Commissioner of West Virginia, wrote to each of the assessors of the fifty-five counties of the State of West Virginia concerning the method of determining the asessment of building and loan and savings and loan associations, and gave them definite instructions as to how they should arrive at the correct assessment (R. 276-277). He then further stated:

> "I further request and instruct you not to deviate from such method by way of discounts or in any other way or means which will produce different results or

assessments than those obtained by such method as shown by such sheets, as this method is in compliance with constitutional and statutory provisions of the law and assessments made in accordance therewith will likewise be made as directed by law."

IV.

**Date of the Judgment or Decree Sought to Be Reviewed, and the Date upon which the Application for Appeal Is Presented.**

The decision of the Supreme Court of Appeals of West Virginia was rendered in this case on February 22, 1944. Within the thirty day period required by law, that is, on the 21st day of March, 1944, these appellants filed a petition for a rehearing, and in the event that it should be refused, a stay of the judgment for ninety days.

On the 15th day of May, 1944, the petition for rehearing was refused, and a stay of the judgment for ninety days to permit the prosecution of this appeal was granted by said Court.

The petition for appeal herein was presented and filed on the 13th day of July, 1944.

A judgment of a State court becomes final for purposes of review in the United States Supreme Court in a case in which a petition for rehearing is entertained upon the date of the denial or other disposition of such petition. *Citizens Bank* v. *Opperman*, 249 U. S. 448, 63 L. Ed. 701.

V.

**Statement Showing That the Nature of the Case and the Rulings of the Court Were Such as to Bring the Case within the Jurisdictional Provisions Relied upon.**

A.

In 1932, the Tax Limitation Amendment to the Constitution of West Virginia was passed, which divided all prop-

erty in West Virginia, other than property of public utilities, the assessment of which is made by the Board of Public Works of the State of West Virginia, into four classes. 1939 Code of West Virginia, Chapter 11, Article 6, Sections 1, 11, 13, etc. Agricultural products, including live stock, bills, notes, money, accounts receivable, etc., were placed in Class I. Therefore, there is no controversy that the assets of building and loan associations such as the appellants were properly within Class I. For many years the Assessor of Kanawha County, West Virginia, as shown by the testimony of the Deputy Assessor in charge of this particular work, had systematically and faithfully ascertained the true and actual value of all of the property in Class I, located in Kanawha County, and as to building and loan associations, had then allowed a deduction of 30% in order to arrive at the correct assessed valuation of the personal property (R. 50). At R. 50-51, this Deputy Assessor testified that he believed that this 30% discount "would be the more equitable assessment."

At R. 55, it is shown that the only reason he assessed the property of these associations at the present figure is because he received specific directions so to do from the State Tax Commissioner's office, and that while he did not agree with those instructions, "I thought we had better probably do as he instructed."

The witness further testified (R. 56) that the deduction of 30% was in accordance with the method used in Kanawha County in assessing intangible personal property.

In stating how the various types of property in Class I were assessed, the witness stated the following method or plan was used:

> "Money is valued, of course, at 100%; accounts receivable are valued at about 70% unless they are installment accounts, and they are valued at approximately 65%.",

this being 65% of the book value shown on the face of them (R. 57).

He testified that live stock was valued at approximately 50% of the purchase price, which was ascertained by asking the farmer what he had paid for a plow or cattle or live stock, taking 50% of that value for assessment purposes (R. 57).

He further stated: "Notes are assessed at approximately 70%" (R. 57). Further that "Bonds are assessed at approximately 70% unless their market value is less. Then, of course, if the market value of bonds is less than 70% we generally factor them slightly under their market value."

That this 70% is of the face value (R. 57-58).

That this is the same system used throughout Kanawha County in all its magisterial districts, by all of the field deputies of the assessor, and is under the instructions of the assessor of that county (R. 58).

With reference to Class II property, it is assessed, according to the witness, at approximately 50% to 60% of the construction cost of the building. The land values are determined by localities (R. 58-59). In some districts the *percentage* is very low, and in others fairly high (R. 59). The 50% to 60% percentage is of the cost or replacement value. That is the method that is used in arriving at the true and actual value (R. 59). Property used exclusively for residential purposes, in Kanawha County, is assessed at a percentage of its cost price, varying from 80% in some districts to 25% in other districts (R. 60).

In Classes III and IV, real estate assessed values are determined as above stated for Class II. Automobiles are assessed at approximately 30% less than the Blue Book value. Gas wells are allowed a one-third deduction; and

merchandise, store goods and all equipment of business establishments are assessed at 60% of the book value or inventory (R. 62).

Household furniture is valued at a very low rate (R. 63).

B.

As above stated, for some years previous the said appellants had listed their property for assessment at the value thereof, and had deducted or discounted therefrom 30% of said value, which figure had been for some years accepted and used by the Assessor of Kanawha County as the true and actual value of said property for assessment purposes.

After the instructions of the said defendant herein, George P. Alderson, State Tax Commissioner, said Assessor of Kanawha County made a revised computation, as of January 24, 1941, of the assessed value of the property of each of the appellants, which revised assessment was, for Charleston Federal Savings & Loan Association, the sum of $921,180.00; for First Federal Savings & Loan Association, the sum of $249,080.00; for West Virginia Building and Loan Association, the sum of $69,490.00; and for Empire Savings & Loan Association, the sum of $273,880.00.

In accordance with the statutes of the State of West Virginia, each of the appellants filed a petition and protest with the County Court of Kanawha County, West Virginia, ex-officio Board of Review and Equalization of said county, and beginning July 17, 1941, and ending July 18, 1941, a hearing was had, and testimony taken, on said petition and protest.

As shown, beginning R. 41 and on pages 42-43, at the end of that hearing the said County Court, ex-officio Board

of Review and Equalization, made a finding and entered its orders thereon, a copy of which is in the Appendix hereto. That Court found that the assessed valuations as of January 1, 1941, made by the Assessor of Kanawha County, West Virginia, were for appellants in the amounts above stated; and further held that said sums "are *in excess of the true and actual values of the respective properties* of the said four protestants, respectively, and that the assessed valuations aforesaid of the said properties of the said protestants are *at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are therefore discriminatory and not uniform and equal,*". (Emphasis supplied).

Thereupon said Board, in said order (R. 43) ordered that the assessed valuations be reduced and fixed as follows: "the Charleston Federal Savings & Loan Association at the sum of $639,030.00, the First Federal Savings & Loan Association at the sum of $170,450.00, the West Virginia Building & Loan Association at the sum of $48,230.00, and the Empire Federal Savings & Loan Association at the sum of $189,600.00;" and ordered the assessed valuation of the properties of each of the protestants be placed on the property books of Kanawha County, West Virginia, for taxation purposes as of January 1, 1941, in those amounts.

On the 18th day of August, 1941, George P. Alderson, State Tax Commissioner, appealed to the Circuit Court of Kanawha County, West Virginia, from the said order of the County Court, alleging (R. 27) that the assessor had correctly assessed the properties of these four appellants "for the purpose of taxation at their true and actual values in compliance with Section 14 A, article 3, chapter 11, of the West Virginia Code * * * and further in compliance with a written instruction issued by the Tax Commissioner

to all county assessors under date of June 24, 1941, relative to the assessment of the properties of all financial institutions operating in the State of West Virginia * * *."

On the 23rd day of December, 1941, the Circuit Court of Kanawha County entered its opinion reversing the County Court of Kanawha County and reinstating the assessed values, as the Court said, "these being the amounts fixed and determined by the said Tax Commissioner and at his direction placed by the Assessor of Kanawha County, West Virginia, upon the property books for assessment purposes * * *."

The Court further held, in substance (the Court's opinion in full is found in the Appendix hereto):

> "The burden of appellee's argument seems to be discrimination because of the fact that the Assessor of Kanawha County assesses other species of property in Class I upon a different basis. As I view it, such argument would be tenable only in the event there was a different assessment of other properties of a like character, in this instance building and loan associations. *The fact that live stock, personal property of other genus and real estate may be assessed upon a certain percentage of its estimated true and actual value, is not in my opinion discriminatory so long as all building and loan associations or institutions of like character are assessed upon a uniform basis.*" (Emphasis supplied.)
>
> "The Courts have taken judicial notice of the long continued practice of assessors throughout the state to assess property, real and personal, at less than its true and actual value, varying in the different counties. If it be the policy of the state throughout its authorized officials to abandon this method of assessment and give literal application to the meaning of the terms 'true and actual value,' who is to gainsay them?"

A statutory appeal under Chapter 11, Article 3, Section 25, Michie's Code of West Virginia, 1941, as amended by

Chapter 41, Acts of the Legislature of West Virginia, 1943, from this final decree and order of the Circuit Court of Kanawha County, West Virginia, reversing the action of the County Court of Kanawha County, was taken to the Supreme Court of Appeals of West Virginia.

The Supreme Court of Appeals of West Virginia sustained the Circuit Court of Kanawha County upon the ground that the Legislature could subdivide any of the four classes set up in the Tax Limitation Amendment to the Constitution and prescribe methods for valuing any class of property therein, so long as that valuation was made uniform throughout the State, and that there was nothing discriminatory or unconstitutional in so doing.

That Supreme Court of Appeals of West Virginia stated that these appellants relied upon the case of *West Penn Power Co.* v. *Board of Review and Equalization*, 112 W. Va. 442, 164 S. E. 682, decided in June, 1932, in which it was held that in a West Virginia county, where the property of one taxpayer was taxed at full value and a discount given to all other property owners in the county, that this was discriminatory and unconstitutional, and the assessed valuation of the property of the one taxpayer must be reduced by the same percentage allowed all other taxpayers in that county.

The Supreme Court of Appeals stated that that decision has been based largely on *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, which had been sustained by the Supreme Court of the United States by many other cases, among which were: *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Louisville & Nashville Ry. Co.* v. *Greene*, 244 U. S 522; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Bohler* v. *Calloway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines National Bank* v. *Bennett*, 248 U. S. 239.

The Court went on to hold that "the force and weight of these decisions, as applied to the present controversy, is largely, if not entirely, nullified by the recent decision of the same Court (Supreme Court of the United States) in *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254."

Upon petition for rehearing, these appellants cited to the Supreme Court of Appeals of West Virginia the then recently decided case of *Joseph E. Snowden, Petitioner*, v. *Edward J. Hughes, et al.*, decided January 18, 1944, Case No. 57, October Term 1943, 12 U. S. L. W. 4144, in which this Court stated, in part:

> "Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, By a Systematic Under-Valuation of the Property of Some Taxpayers and a Systematic Over-Valuation of the Property of Others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 599, 607, 609-10; *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 526. Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long-continued. *Cf. McFarland v. American Sugar Co., supra.*" (P. 4146.) (Emphasis supplied.)

Note:

> "See also *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 20, 36; *Sioux City Bridge Co.* v. *Dakota Co.*, 260 U. S. 441, 447; *Bohler* v. *Calloway*, 267 U. S. 479,

489; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 25, 28; *cf. Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 139."

The Court further stated:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, *cf. McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-4."

Justice Frankfurter, in a concurring opinion, states:

"I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State, *certainly not until the highest court of the State confirms such action and thereby makes it the law of the State.*" (Page 4148.) (Emphasis supplied.)

## VI.

**The Stage in the Proceedings in the Court of First Instance, and in the Appellate Court, at which, and the Manner in which, the Federal Questions Sought to Be Reviewed Were Raised, the Method of Raising Them, and the Way in which They Were Passed upon by the Court; the Rulings of the Court Thereon to Show That the Case Is Brought within the Statutory Provision Believed to Confer Jurisdiction on This Court.**

The petitions and protests of each of the appellants made to the county Court of Kanawha County, ex-officio Board

of Review and Equalization, each contained, in paragraph 3, that the assessment as made by the assessor at the direction of the State Tax Commissioner, "is discriminatory, is not uniform and equal, is in violation of the provisions of the Constitution and amendments thereto of the State of West Virginia and the United States of America, particularly Section 1, Article X, of the Constitution of West Virginia, * * * and the 14th Amendment to the Constitution of the United States of America." (See, R. 34, 36, 38 and 40).

Counsel for the petitioners, at the beginning of the hearing before the said County Court, raised the same Federal questions in his opening statement to the Court (R. 47). Upon the ruling of the Circuit Court of Kanawha County, upon the appeal taken thereto, and in the objections and exceptions to said ruling, the petitioners, again in their third exception, raised the said question of discrimination and of violation of the provisions of the Constitution of West Virginia and the denial of equal protection of the laws and discrimination against the petitioners in violation of the Constitution of the United States (R. 310). In their petition for appeal to the Supreme Court of Appeals of West Virginia these petitioners again raised the question of discrimination and the denial of equal protection under Section 1 of the 14th Amendment to the Constitution of the United States, in their second question entitled "Discriminatory Assessment," beginning R. 11 and continuing through R. 15.

There is hereinabove set out more specifically exactly how the Federal question was raised and how it was passed upon by each of the three courts, and there is also set out specific quotations from the Record, with page numbers attached, to show that the rulings were such as to bring

it within the provisions conferring jurisdiction upon the Supreme Court of the United States.

## VII.

### Questions Presented for Decision.

It is respectfully submitted that a question is presented as to whether the decisions of the United States Supreme Court are in conflict, and a question whether there has been discrimination and a denial of equal protection under the laws to the appellants, and a specific question of the validity of a statute of the State of West Virginia, on the ground of its being repugnant to the Constitution and laws of the United States, and a decision in favor of its validity by the highest court of that State.

The West Virginia Tax Limitation Amendment, concerning the validity and constitutionality of which there is no question, divided property into four classifications. The State Tax Commissioner arbitrarily, and we contend discriminatorily, decided that he could redivide Class I of that Tax Limitation Amendment into subdivisions and tax certain of the properties of that Class I at a higher rate than other properties, and that he was permitted and required so to do by virtue of the statute of West Virginia, and we contend, in violation of the Constitution of West Virginia, which provides that taxation shall be equal and uniform; and that the Supreme Court of Appeals of West Virginia, in upholding the right of the Tax Commissioner so to do, and in giving approval to his interpretation of said statute, has caused the appellants to be discriminated against, and for them to be deprived of equal protection under the laws, as provided by Section 1 of the 14th Amendment to the Constitution of the United States, and to be deprived of their property without due process of the law.

As will be set out hereinafter more fully, this Court has consistently held over a long period of years that a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute, is purposeful and a denial of equal protection under the laws; that a statute of a State in violation of its constitution, purporting to permit such discrimination, or an interpretation given thereto by an official of the State, sustained by the highest court of that State, thereby making it the law of that State, is equally discriminatory. However, the precise question as to whether one certain group of taxpayers who are incorporated in a larger group by the Constitution of the State can be singled out for such discrimination, and have that held to be valid and lawful, we respectfully contend, has not yet been passed upon by this Court, and that this, together with the question of whether the decisions of the Supreme Court of the United States are in conflict, are the substantive questions which are and should be decided by the Supreme Court of the United States.

## VIII.

### Statement and Argument of the Grounds upon which it Is Contended That the Questions Involved Are Substantive.

### A.

We have hereinabove stated the questions and the facts.

The first question, as shown above, is whether there is a conflict in the decisions of the Supreme Court of the United States, as there has been held to be by the Supreme Court of Appeals of West Virginia.

The Supreme Court of Appeals of West Virginia, at page 14 of its typewritten opinion, as we have above set forth herein, stated that the appellants strongly relied upon the case of *West Penn Power Co.* v. *Board of Review and Equalization,* 112 W. Va. 442, 164 S. E. 862. That case was decided mainly upon the basis of *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 67 L. Ed. 340, with the Court reciting that the latter case held where a taxpayer's property is taxed at 100% of its true and actual value, it is his right to have his assessment reduced to the percentage of values at which other properties of the same class in the same governmental unit of the United States are taxed, "even though the statute requires that all property be taxed at its true and actual value." The Supreme Court of Appeals of West Virginia was correct in stating that the appellants relied upon the *West Penn* case and upon the decisions of the Supreme Court of the United States which were therein cited and relied upon by the Court.

The Supreme Court of Appeals of West Virginia, in substance, frowns now upon the decision in the *West Penn* case, and states directly, at page 15 of its opinion, that the cases of the United States Supreme Court relied upon therein are in substance overruled by *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning,* 310 U. S. 362, 84 L. Ed. 1254.

We respectfully submit that that case last cited does not overrule the former decisions of the Supreme Court of the United States upon the point in question.

As Mr. Justice Frankfurter carefully set out in the opinion:

> "All Tennessee property is subject to such a tax; but there are two schemes of procedure for making assessments, one for public service corporations and

one for other taxpayers. As to ordinary property the task of valuation rests upon officials of the various counties. For public service corporations the assessments must be made by the Railroad and Public Utilities Commission, which is commanded to ascertain the 'actual cash value' of corporate property situated in Tennessee."

This same scheme of taxation applies in West Virginia, as hereinabove stated, whereby the properties of public utilities are assessed for taxation by the Board of Public Works, and other property is assessed by the assessors in each county. In the *Nashville* case the question there raised was whether there was discrimination by virtue of the taxation of the public utilities by the board created for that purpose at one valuation and taxation of properties by the county assessors at a lower valuation. It was there stated that this differentiation in valuation by the two different methods of taxation had continued for more than forty years. The Court, through Mr. Justice Frankfurter, then stated:

"It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. (Citing Raymond *v.* Chicago Union Traction Co.; Sunday Lake Iron Co. *v.* Wakefield; Sioux City Bridge Co. *v.* Dakota County; Bohler *v.* Callaway; Cumberland Coal Co. *v.* Board of Revision; Iowa-Des Moines Nat. Bank *v.* Bennett.) All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation,

was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment."

Therefore, the problem presented in that case was entirely different from the problem in the instant case, and we respectfully contend that the Supreme Court of the United States itself distinctly held that they were not overruling those cases which we contend apply to the instant situation.

We further respectfully contend that our case is directly within the exception noted by Mr. Justice Frankfurter, in that the Constitution of West Virginia provides for certain taxpayers to be in Class I, and states that all taxation shall be equal and uniform, and that when a discrimination, uniform and systematic, is made against a taxpayer within that Class I in favor of other taxpayers within that class, that this is unlawful and unconstitutional.

It is further respectfully submitted that the Supreme Court of the United States, in *Snowden* v. *Hughes*, 12 U. S. L. W. 4144, hereinabove cited, specifically held, in the opinion by Mr. Justice Stone, and in the concurring opinion by Mr. Justice Frankfurter, that the cases cited by the Supreme Court of Appeals of West Virginia, on page 15 of its opinion, as being overruled, were specifically still in effect.

B.

The second substantive proposition is the uniform and equal taxation of all property in proportion to its value, as required by the Constitution of West Virginia and the 14th Amendment to the Constitution of the United States, and that any statute passed or any interpretation thereof given approval by the highest court of the State which permits or allows the assessment of the property of some owners for taxation purposes at its true and actual value, and

the property of other owners at a substantial discount therefrom, by an admitted, intentional, systematic and customary practice, is unconstitutional, arbitrary and discriminatory, and a deprivation of equal protection under the laws, and the owner of such property who is so discriminated against is entitled to have his assessment reduced to the common level of those whose property is assessed lower, and a refusal so to do is violative of the 14th Amendment to the Constitution of the United States.

Under Point V. A hereinabove is set out at some length testimony showing that for some years prior the Assessor of Kanawha County had always valued the property of these appellants by taking its value and subtracting 30% thereof; that this was in accordance with a plan used with relation to all other properties in Class I, and, in fact, used substantially the same plan for properties in Classes II, III, and IV; that he only changed from this plan at the specific direction of the defendant, the State Tax Commissioner, and that he disagreed with the State Tax Commissioner's order in so doing; that he felt that the only equitable plan was to give these appellants the same 30% discount that all other taxpayers in Class I received.

Upon appeal to the County Court of Kanawha County, ex-officio Board of Review and Equalization, in their opinion they specifically found "that the assessed valuations aforesaid of the said properties of the said petitioners and protestants are at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are discriminatory and not uniform and equal." We respectfully submit that therefore these cases come within all of the rules laid down by this Court whereby relief is granted only if it is shown that there is a systematic under-valuation of the property of some taxpay-

ers and a systematic over-valuation of the property of others, which therefore shows a purposeful discrimination.

We believe that the Circuit Court of Kanawha County, in its opinion, stated the crux of the question. That court stated that there was no discrimination shown by reason of the fact that certain of the taxpayers in Class I were assessed upon a reduced value for their properties so long as all building and loan associations or institutions of like character are assessed upon a uniform valuation. In other words, that Class I could be subdivided by arbitrary decision of the Tax Commissioner, and unequal tax assessments made which would not be discriminatory so long as they were equally applied to each of the two classes created by decision of the Tax Commissioner.

While we must respectfully disagree most strongly with this assertion and opinion of the Circuit Court of Kanawha County, we nevertheless must further disagree with it because there is no evidence in the Record to show that such assessments on building and loan associations were made uniform throughout the State of West Virginia, but the evidence only discloses that there was discrimination in Kanawha County as concerns these apppellants.

We quote but two relevant parts of decisions from the Supreme Court of the United States, and for the purpose of brevity merely cite other decisions which are among the multitudinous decisions sustaining our contention.

In *Sioux City Bridge Co.* v. *Dakota County*, *supra*, the Supreme Court of the United States stated:

> "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle

that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska Supreme Court in this case upholds the violation of the 14th Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."

In the case of *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, syllabus 7 of that case states:

"The requirement of Ky. Const., Sec. 172, that all property 'shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale,' will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes, based upon an assessment of the intangible property of a public service corporation by the State Board of Valuation and Assessment at not more than its fair cash value, *where the local assessing officers charged with valuing other classes of property systematically undervalue such property*, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of Sec. 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation." (Italics suppplied.)

In the *West Penn case* above cited, syllabus 2 thereof, which was law in West Virginia, holds:

"Under the Fourteenth Amendment of the Constitution of the United States it is the right of a taxpayer whose property is taxed at one hundred per centum of its true and actual value to have his assessment reduced to the percentage of that value at which other

properties of the same class in the same governmental unit of taxation are taxed, even though the statute requires that all property be taxed at its true and actual value."

In *Cummings* v. *Merchants' National Bank of Toledo*, 101 U. S. 157, 25 L. Ed. 903, Mr. Justice Miller stated:

"Independently of this Statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

See also:

*Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78;
*Bohler* v. *Callaway*, 267 U. S. 479, 69 L. Ed. 745;
*Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 76 L. Ed. 146;
*Booneville National Bank* v. *Schlotzhauer* (Mo.), 298 S. W. 732, 55 A. L. R. 489;
*Knox* v. *Southern Paper Co.* (Miss.), 108 So. 288;
*Randals* v. *State* (Tex.), 15 S. W. (2d) 715;
*Pacific Telephone Co.* v. *W.* (Wash.), 34 P. (2d) 751;
*Peninsula Power Co.* v. *W. T. Co.* (Wis.), 218 N. W. 371;
*People* v. *G. T. W. R. Co.*, 357 Ill. 493, 192 N. E. 645;
3 A. L. R. 1317, Note;
28 A. L. R. 983, Note;
55 A. L. R. 503, Note.

## Conclusion.

We therefore respectfully submit that the decision of the Supreme Court of Appeals of West Virginia affirming the decision of the Circuit Court of Kanawha County, West Virginia, should be reversed, and that the finding and order of the County Court of Kanawha County, ex-officio Board of Review and Equalization, should be reinstated, and that an appeal should be allowed in order that this may be done.

Respectfully submitted,

KOONTZ & KOONTZ,
W. ELLIOTT NEFFLEN,
J. CAMPBELL PALMER, III,
*Counsel of Appellants.*

## APPENDIX.

BEFORE THE COUNTY COURT OF KANAWHA COUNTY, WEST VIRGINIA, EX-OFFICIO BOARD OF REVIEW AND EQUALIZATION.

In the Matters of Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, *Petitioners and Protestants;*

And, also,

Empire Savings and Loan Company and Capital Building and Loan Association, *Petitioners and Protestants.*

Assessment for the purposes of taxation as of January 1, 1941.

On the 17th day of July, 1941, came Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, and West Virginia Building & Loan Association, petitioners and protestants, by their counsel, Koontz & Koontz and W. Elliott Nefflen, and also came the State of West Virginia and George P. Alderson, State Tax Commissioner of West Virginia, by their counsel, Clarence W. Meadows, Attorney General of West Virginia, by W. Holt Wooddell, Assistant Attorney General of West Virginia, and Howard J. Gibson, and thereupon the three protestants respectively tendered their separate written petitions and protests, and upon motion the same, and each of them, were thereupon filed, the said protestants each claiming that the respective assessed valuations of their properties, as of January 1, 1941, as shown by the property books of Kanawha County, West Virginia, are in excess of their true and actual values, and furthermore proportionately higher than the assessment valuation of other properties of other owners and taxpayers in Kanawha County, and therefore not uniform and equal, all of which is more fully and at large set up in each of said petitions and protests; and thereupon evidence, consisting of the testimony of witnesses and the filing of exhibits, was adduced on behalf of said

protestants and the State of West Virginia before Reuel E. Sherwood, a shorthand reporter, and completed on July 18, 1941. On July 18, 1941, the Empire Federal Savings & Loan Association, by its counsel, Koontz & Koontz and W. Elliott Nefflen, tendered its written petition and protest, and upon motion said written petition and protest was ordered filed, the said Empire Federal Savings & Loan Association adopting in its behalf the evidence adduced on behalf of the other three petitioners and protestants aforesaid; and after all of the evidence had been adduced on behalf of the other three petitioners and protestants and the State of West Virginia, which said evidence, consisting of the testimony of witnesses and exhibits, taken and certified by Reuel E. Sherwood, shorthand reporter, is hereby made a part of the record herein, and upon consideration of all of which, the County Court of Kanawha County, West Virginia, sitting as the Board of Review and Equalization for said Kanawha County, is of the opinion, and doth hereby find, that the assessed valuations, as of January 1, 1941, made by the Assessor of Kanawha County, West Virginia, as shown on the property books of Kanawha County, West Virginia, which said property books for the current year, commencing January 1, 1941, have been submitted by the Assessor of Kanawha County to, and are now before, this County Court, sitting as the Board of Review and Equalization, of the property of the Charleston Federal Savings & Loan Association, in the sum of $921,180.00, of the property of the First Federal Savings & Loan Association, in the sum of $249,080.00, of the property of the West Virginia Building & Loan Association, in the sum of $69,490.00, and of the property of the Empire Federal Savings & Loan Association, in the sum of $273,880.00, are in excess of the true and actual values of the respective properties of the said four protestants, respectively, and that the assessed valuations aforesaid of the said properties of the said petitioners and protestants are at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are discriminatory and not uniform and equal, and thereupon the said County Court of Kanawha County, sitting as the Board of Review and Equalization, is of the opinion to,

and doth hereby, order that the assessed valuations, respectively, as of January 1, 1941, of the said four petitioners and protestants be, and the same are hereby reduced and fixed, as follows: the Charleston Federal Savings & Loan Association at the sum of $639,030.00, the First Federal Savings & Loan Association at the sum of $170,450.00, the West Virginia Building & Loan Association at the sum of $48,230.00, and the Empire Federal Savings & Loan Association at the sum of $189,600.00; and it is hereby further ordered and directed that the assessed valuation of the properties of each of said four protestants as fixed by this County Court, sitting as the Board of Review and Equalization of Kanawha County, be placed on the property books of Kanawha County, West Virginia, for taxation purposes as of January 1, 1941.

And also on the 18th day of July, 1941, the Empire Savings & Loan Company, by James Kay Thomas, its attorney, filed its written petition and protest, and also the Capitol Building & Loan Association, by Robert Watt, its Secretary-Treasurer, filed its written petition and protest, claiming that the assessed valuations of their respective properties, as of January 1, 1941, as shown by the property books of Kanawha County, West Virginia, are in excess of their true and actual values and proportionately higher than the assessed valuations of properties of other owners and taxpayers in Kanawha County, and therefore discriminatory and not uniform and equal, and asked that upon the evidence adduced in the matters of Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, be considered in connection with their two separate petitions and protests; and the County Court of Kanawha County, West Virginia, sitting as the Board of Review and Equalization for said Kanawha County, is of the opinion, and doth hereby find, that the assessed valuations as of January 1, 1941, made by the Assessor of Kanawha County, West Virginia, as shown on the property books of Kanawha County, West Virginia, which said property books for the current year, commencing January 1, 1941, have been submitted by the said Assessor of Kanawha County to, and are now before

this County Court, sitting as the Board of Review and Equalization, of the property of Empire Savings & Loan Company in the sum of $300,040.00, and of the property of Capitol Building & Loan Association in the sum of $429,020.00, are in excess of the true and actual values of the respective properties of said last named two protestants, respectively, and that the assessed valuations aforesaid of the said properties of the said two protestants are at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are therefore discriminatory and not uniform and equal, and thereupon the said County Court of Kanawha County, sitting as the Board of Review and Equalization for said county, is of the opinion to, and doth hereby order, that the assessed valuation as of January 1, 1941, of Empire Savings & Loan Company be, and the same is hereby, reduced and fixed at the sum of $210,000.00, and the assessed valuation as of January 1, 1941, of Capitol Building & Loan Association be, and the same is hereby, reduced and fixed at the sum of $300,300.00; and it is hereby further ordered and directed that the assessed valuations of the properties of each of said two protestants as fixed by this County Court, sitting as the Board of Review and Equalization of Kanawha County, be placed on the property books of Kanawha County, West Virginia, for taxation purposes as of January 1, 1941.

Enter this 18th day of July, 1941.

County Court of Kanawha County, West Virginia,
Ex-Officio Board of Review and Equalization,
—— —— President; —— —— Commissioner;
—— —— Commissioner.

## Appeals.

George P. Alderson, *State Tax Commissioner,*

*vs.*

County Court of Kanawha County Sitting as a Board of Equalization and Review.

In the Matter of Tax Assessments against Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, Empire Federal Savings & Loan Association, Empire Savings & Loan Company and Capitol Building & Loan Association.

This cause came on to be heard upon the petition of George P. Alderson, State Tax Commissioner of the State of West Virginia, praying for an appeal from the order and finding of the County Court of Kanawha County, West Virginia, ex-officio Board of Review and Equalization in and for Kanawha County, West Virginia, herein referred to as Board of Review and Equalization, reducing the valuations, respectively, fixed upon the properties of Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, by the Assessor of Kanawha County, West Virginia, the said Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association and Empire Federal Savings & Loan Association being represented by their counsel, Koontz & Koontz and W. Elliott Nefflen, and said Empire Savings & Loan Company, by its counsel, James Kay Thomas, and the Capitol Building & Loan Association by its counsel, Koontz & Koontz and W. Elliott Nefflen, and the said George P. Alderson, State Tax Commissioner as aforesaid, being represented by his counsel, W. Holt Wooddell, Assistant Attorney General of West Virginia, and

Howard J. Gibson; and upon the evidence, exhibits, records and papers taken and filed in the proceedings before the Board of Review and Equalization in and for Kanawha County, West Virginia, as certified by said Board.

Thereupon, by agreement between said Howard J. Gibson, counsel for the State Tax Commissioner as aforesaid, James Kay Thomas, counsel for the Empire Savings & Loan Association, and W. Elliott Nefflen, of counsel for the Capitol Building & Loan Association, the appeal as to Empire Savings & Loan Company and the Capitol Building & Loan Association, and the matters of law and fact arising thereon, are held in abeyance in status quo, on the open docket, and this cause came on to be heard only as to the said Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association and Empire Federal Savings & Loan Association, upon the matters of law and fact arising upon the record and upon the evidence and exhibits so certified by said Board of Review and Equalization in and for the said County of Kanawha, and was duly argued by counsel for the appellant, said George P. Alderson, State Tax Commissioner as aforesaid, and counsel for the respondents, said four associations last named and mentioned. Upon consideration of the evidence, exhibits and records so certified by the said Board of Review and Equalization, in and for Kanawha County, West Virginia, and of the arguments of counsel thereon, the Court is of the opinion to and doth find that the action of the said Board of Review and Equalization in and for the said Kanawha County in reducing the valuations, respectively, of the properties of the Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association and Empire Federal Savings & Loan Association, be and the same is hereby reversed, and it is adjudged, ordered and decreed that the assessments of the valuations of the properties of said four associations be and the same hereby are restored to the amounts fixed by the Assessor of said Kanawha County, as directed to be made by the said Tax Commissioner, said assessments being the true and actual values of

the respective properties of the four associations, respectively, as of January 1, 1941, as follows, to-wit:

| | |
|---|---|
| Charleston Federal Savings & Loan Association | $921,180.00 |
| First Federal Savings & Loan Association | 249,080.00 |
| West Virginia Building & Loan Association | 69,490.00 |
| Empire Federal Savings & Loan Association | 273,880.00 |

these being the amounts fixed and determined by the said Tax Commissioner, and at his direction placed by the Assessor of Kanawha County, West Virginia, upon the property books for assessment purposes in and for the said County of Kanawha, State of West Virginia, for the tax year commencing January 1, 1941; and the opinion of this Court in so finding and in reversing the action of the said Board of Review and Equalization in and for said Kanawha County, is as follows:

"Following the decision of the Supreme Court of Appeals in the case of Charleston Federal Savings and Loan Association, et al. v. James, 120 W. Va. 781, the Legislature by Chapter 118 of the Acts of 1939, added a new section, 14-A, to Article 3 of Chapter 11 of the Code, providing expressly for the assessment of building and loan associations.

"The State Tax Commissioner evolved a formula for the assessment of such bodies, the expressed intent of such being to 'produce uniform and equal assessment and taxation of the properties of all such institutions and corporations throughout the state.' It is axiomatic that the Courts pay great respect to the construction by administrative agencies of the state to statutes coming within the purview of their functions. In the words of the minority opinion in the case of Loan Association v. James, 'Years of administrative acquiescence and effectuation' should not be supplanted by some other theory. We have here a situation of 'administrative effectuation' of a new statute by the state agency charged with its enforcement, and unless the same is shown to be conclusively arbitrary and wholly wrong in theory, it will not be disturbed; and upon the record here I cannot find such to be the case.

"The burden of appellee's argument seems to be discrimination because of the fact that the assessor of Kanawha County assesses other species of property in Class I upon a different basis. As I view it, such argument would be tenable only in the event there was a different assessment of other properties of a like character, in this instance building and loan associations. The fact that live stock, personal property of other genus and real estate may be assessed upon a certain percentage of its estimated true and actual value, is not in my opinion discriminatory so long as all building and loan associations or institutions of like character are assessed upon a uniform basis.

"The Courts have taken judicial notice of the long continued practice of assessors throughout the state to assess property, real and personal, at less than its true and actual value, varying in the different counties. If it be the policy of the state throughout its authorized officials to abandon this method of assessment and give literal application to the meaning of the terms 'true and actual value,' who is to gainsay them?

"For the reasons herein briefly outlined, the action of the County Court of Kanawha County sitting as a Board of Review and Equalization in assessing the properties of the appellees will be reversed and the assessment restored to that directed to be made by the State Tax Commissioner."

It is further adjudged, ordered and decreed that the costs of this appeal be charged to the said four associations last above named.

Thereupon, the said four associations, namely, Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, jointly and severally, objected and excepted to the opinion, finding, ruling and judgment of the Court, the grounds of their objections and exceptions being:

First: That the finding and judgment of the Court are contrary to the law and the evidence;

Second: That the Court erred in finding that the valuations, as determined by the State Tax Commissioner, are

the true and actual values, that the valuation of the property of the Charleston Federal Savings & Loan Association, is the sum of $921,180.00; First Federal Savings and Loan Association. the sum of $249,080.00; West Virginia Building & Loan Association, the sum of $69,490.00; and Empire Federal Savings & Loan Association, the sum of $273,880.00. Such valuations of the properties of said four associations, respectively, as being the true and actual values thereof, respectively, are contrary to the evidence.

Third: That the Court erred in finding that, although other personal property placed in Classification I, as provided by Section 1, Article X, of the Constitution of West Virginia (that being the same class in which the properties of building and loan and savings and loan associations are placed for taxation purposes) may be assessed at a lower valuation than the true and actual value, namely, upon a certain percentage of the true and actual value thereof, such fact is not discriminatory against these said four associations. Such finding and judgment of the Court are in violation of and contrary to the provisions of Section 1, of the Fourteenth Amendment to the Constitution of the United States of America, and also the provisions of Section 1, Article X, of the Constitution of West Virginia, in that said four associations are not accorded the equal protection of the laws, are discriminated against in favor of other taxpayers owning property placed in Classification I as provided by Section 1, Article X, of the Constitution of West Virginia, and are unequally burdened, and, therefore, their properties are not uniformly taxed along with other properties in Classification I or with properties placed in the other classifications, namely, Classification II, Classification III and Classification IV.

The said Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, having indicated their desire to apply to the Supreme Court of Appeals of West Virginia for an appeal from, and writ of error, and supersedeas to, said judgment and decree, on their motion by their counsel, the effect of this decree and order is suspended for a period of

ninety days from this date upon the said Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, or any one of them, or someone for them, entering into a bond before the Clerk of this Court, with sureties approved by the Clerk of this Court, in the penalty of $100.00, in the form and upon the conditions prescribed by law.

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No. 9501.

IN RE: TAX ASSESSMENTS AGAINST CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING AND LOAN ASSOCIATION AND EMPIRE SAVINGS & LOAN ASSOCIATION.

Kanawha County. Affirmed.

Fox, Judge:

1. "The legislature has power to prescribe the method by which the valuation of any class of property may be ascertained, and, where the value of the same class of property is ascertained throughout the state in the same manner, such valuation can not be regarded as unconstitutional for lack of uniformity or equality." *Charleston & Southside Bridge Co. v. County Court*, 41 W.Va. 658, Pt. 2, Syl.

2. Under Section 1, Article X of the Constitution of West Virginia, the legislature has power to direct by law the method of assessment of all classes and types of property, and to apply different methods to different types of property, even though included in the same constitutional classification as respects the rate of levies which may be laid thereon.

3. To entitle a complaining taxpayer to relief under the "equal and uniform" provision of Section 1, Article X of the Constitution of West Virginia, there must be a clear showing of discrimination against him in the assessment of the same type of property. Such discrimination is not established where the showing is only that other property of

a different type is assessed at less than its apparent or face value, through a process of estimation, and in a good faith effort to arrive at the true and actual value thereof.

Fox, Judge:

The appellants, Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association, and Empire Federal Savings & Loan Association, complain of a final order of the Circuit Court of Kanawha County, entered on the 23rd day of December, 1941, fixing the 1941 assessment for tax purposes of the intangible property owned by them, respectively. Their appeal is prosecuted under the provisions of Code, 11-3-25, as amended by Chapter 41, Acts of the Legislature, Regular Session 1933.

The Assessor of Kanawha County, following instructions of the State Tax Commissioner, made the following assessments of the intangible property of the appellants, taxable in said county, for the year 1941: Charleston Federal Savings & Loan Association, $921,180; First Federal Savings & Loan Association $249,080; West Virginia Building & Loan Association $69,490; and Empire Federal Savings & Loan Association $273,880. On protest filed before the county court of said county, acting as a Board of Review and Equalization, under the provisions of Article 3, Chapter 41, Acts Regular Session, 1933, a hearing was had before said board, which resulted in an order reducing said assessments approximately thirty per cent, and they were fixed as follows: Charleston Federal Savings & Loan Association, $639,030; First Federal Savings & Loan Association, $170,450; West Virginia Building & Loan Association, $48,230; and Empire Federal Savings & Loan Association, $189,600. These reductions appear to have been made solely on the theory that other property of the same class, in the same taxing district, was assessed at approximately seventy per cent of its true and actual value, and that the assessments made by the assessor discriminated against protestants. No contention has ever been made that the assessments of the property of the appellants, made by the assessor, were in excess of the true and actual value thereof.

The State Tax Commissioner prosecuted an appeal from the action of the Board of Review and Equalization to the Circuit Court of Kanawha County, and on December 23, 1941, that court entered an order reversing the action of said board and fixing the assessments in question at the same amounts as those originally made by the assessor, from which action of the circuit court we granted this appeal.

The property of the appellants, the assessment of which is here involved is Class I property, as defined by Article 8 of Chapter 38, Acts Regular Session, 1933, and carries an initial tax rate of fifty cents on each one hundred dollar valuation. This statutory classification was made under Section 1, Article X of our Constitution, the pertinent provisions of which are:

> "Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon * * *."

In connection with the constitutional provision quoted above, it is well to keep in mind the general provisions of our statute, Code, 11-3-1, relating to the assessment of property of all classes. These are:

> "All property shall be assessed annually as of the first day of January at its true and actual value: that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which

> is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, * * *"

Questions affecting the assessment of the property of building and loan associations have received the attention of the courts and the legislature in recent years. Prior to the adoption of the tax limitation amendment, (Section 1 of Article X of the Constitution) and enabling statutes enacted thereunder, the property of building and loan associations was not assessed for tax purposes to the association itself, but investments therein were assessed to individual firm or corporate stockholders, following the decison of this Court in *Ohio Building and Loan Company* v. *County Court*, 42 W. Va. 818, 26 S. E. 203. However, in the later case of *Charleston Federal Building & Loan Association* v. *James*, 120 W. Va. 781, 200 S. E. 845, decided on December 8, 1938, it was held that, "Both state and federal building and loan associations are incorporated companies within the meaning of Code, 11-3-12, and are corporations within the meaning of Code, 11-3-13. Therefore, their intangible and other personal property is subject to taxation."

The legislature convened in regular session in January, 1939, and was charged with knowledge of the case last cited above when it enacted Chapter 118 of the Acts of that session, now carried in Michie's Code, 1943, as Section 14a, Article 3, Chapter 11. That section is a comprehensive one, and covers in detail all phases of the assessment of the property of building and loan and federal savings and loan associations. We note the first paragraph of the section, which reads as follows:

> "The capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value, according to the rules prescribed by this chapter, to such building and loan association or federal savings and loan association in the county, district and town where such as-

sociation is located; Provided, however, That such shares and such accounts held by the United States government or any of its agencies shall not be included in determining the assessment. The real and actual value of such capital, represented by the market value of such investment shares and investment accounts as aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain whether from any return made by such association to any officer of this state or the United States, from actual sales of such investment shares and investment accounts, from answers to questions by the assessor, as hereinafter provided, or from other trustworthy sources."

Paragraphs 2 and 3 of the section go into further detail as to the duties of the officials of such associations, the assessment of its real estate, and other details not necessary to consider here.

We do not understand that appellants question either the intent or the power of the legislature to fix the methods of assessment of the particular type of property owned by building and loan and federal savings and loan associations. The power of the Legislature to enact such a statute seems clear, and has been exercised in a number of instances. For example, Code, 11-6, as amended, covers the assessment of the property of public service corporations; Code, 11-8-12 and 13, prescribes how the property of other corporations shall be assessed; Section 14 of the same article, as amended by Chapter 40, Acts Regular Session, 1933, provides for the assessment of the property of banking institutions; Section 15, as amended by Chapter 40, Acts Regular Session, 1933, covers the assessment of the property used in trade or business by natural persons. Therefore, when the legislature enacted Chapter 118 of the Acts of 1939, it only added to existing statutes covering the assessment of various types of property, and created no innovation on former practices. Even if it had done so, Section 1, Article X of the Constitution gives the legislature power to direct how the value of any class of property shall be ascertained, and this power has been expressly upheld by this Court

in *Charleston & Southside Bridge Co.* v. *Kanawha County Court*, 41 W. Va. 658, 24 S. E. 1002.

But we do not understand the appellants to contend that, admitting the power and efficacy of the legislative enactment of 1939, the same cannot be administered as directed, where to do so would discriminate against owners of other property of the same class in the same taxing district. This in reality is the paramount question presented on this appeal.

Appellants have produced testimony tending to show that other classes of property, such as real estate, oil and gas properties, automobiles and household goods are assessed at less than their true and actual value in Kanawha County. We think this testimony must be disregarded. The "equal and uniform" provision of our Constitution "means merely that as to classes of property, business or income there shall be uniformity of taxation." *Christopher* v. *James*, 122 W. Va. 665, 12 S. E. 2d 813, 816. See also *Charleston & Southside Bridge Co.* v. *County Court, supra;* In re Hancock County *Federal Savings & Loan Association*, 125 W. Va. —, 25 S. E. 2d 543. But they also introduce evidence which shows the manner in which intangible personal property such as notes, accounts and certain types of bonds, as well as other types of Class I property are assessed. It is important at this point to ascertain just how these assessments are made, and, fortunately, we have the testimony of the chief deputy of the Assessor of Kanawha County, whose statement is clear and explicit as to the methods of assessment followed. After stating that live stock, property employed in and products of agriculture, money, notes, accounts receivable, and bonds other than government, state and municipal, and shares of building and loan associations are treated as Class I property, his examination follows:

> "Q. In issuing your instructions to your field deputies will you state how you instruct them to value the various types of property which you state are in Class 1? What method or plan is used?
>
> "A. Money is valued, of course, at 100%; accounts receivable are valued at about 70% unless they are

installment accounts, and they are valued at approximately 65%.

"Q. You mean installment accounts are valued at 65%?

"A. Yes.

"Q. You mean 65% of their book value or the value shown on the face?

"A. Yes, the book values shown on the face of them.

"Q. How about other personal property such as livestock and agriculture products?

"A. Livestock is valued *as* approximately 50% of the purchase value.

"Q. How do you ascertain that purchase value in your instructions to your field deputies?

"A. By asking the farmer what he paid for a plow or cattle *of* livestock, and also using their own judgment.

"Q. How about notes?

"A. Notes are assessed at approximately 70%.

"Q. How about bonds?

"A. Bonds are assessed at approximately 70% unless their market value is less. Then, of course, if the market value of bonds is less than 70% we generally factor them slightly under their market value.

"Q. But generally you take 70% of the face value?

"A. That is the usual general procedure, yes, sir.

"Q. Is that same system used throughout Kanawha County in all its magisterial districts by all of your filed deputies?

"A. Yes, sir.

"Q. Is that done under your supervision?

"A. Yes, sir.

"Q. From whom do you receive your instructions?

"A. From Mr. Abbot, the Assessor of Kanawha County."

There is also testimony showing that the assets of certain loan companies, shown by the record to be commonly called "Small Loan Companies", as distinguished from commercial banks and trust companies are assessed at figures running from eighty-five to eighty-eight per cent of their face value. There is no showing as to the method

employed in the assessment of the assets of trust companies and commercial banks, and we assume such assessments are made as directed by Code, 11-3-14, as amended by Chapter 40 Acts Regular Session, 1933. The testimony shows that the assessor in fixing the value of Class I property, employed a uniform and systematic plan as to the different types of property included in the general Class I classification. Therefore, no question of error of judgment is involved. What the assessor did was intentional and followed a preconcerted plan, and, this being true, is discrimination against the appellants clearly shown? Money is assessed at its face value, as are the assets of commercial banks, and as to them it cannot be claimed there is any discrimination one over the other, or against the appellants. It may be claimed that the method employed in the assessment of loan companies is discriminatory, but to sustain that claim appellants would have to concede that the securities held by such loan companies are of the same type, and as well secured as their own. That loan companies of the class mentioned are engaged in a business different from, and involving greater risk than that in which building and loan and federal savings and loan associations are engaged is well known and will not, we think, be disputed. We run into a situation impossible of solution when we attempt to make any comparison as between the assessments of live stock, agricultural equipment and farm products on the one hand, and secured assets of a bank or building and loan association on the other. When we come to assessment of notes and accounts, we think it clear, from the testimony of the deputy assessor, that what is done is assess them at sixty-five to seventy per cent of their face value as reported to the assessor. Bonds are assessed at seventy per cent of their face value, unless their market value is less, and then at a figure slightly under their market value. In view of all this, can it be said that there has been such discrimination as justifies the complaint of the appellants.

That the assets of the appellants are made up of high-grade securities will not be denied. There is and can be no reasonable doubt as to their being worth one hundred per cent of their face value. No one can question values

based on securities of the Government of the United States. When we come to their chief business, that of lending money on real estate, we must consider that every loan is made upon fair appraisement of real estate; the loans are confined to a percentage of the appraised value of such real estate, in order to guard against fluctuation in value; the property on which the loans are made is insured against destruction by fire and otherwise, and, generally, every possible step taken to secure the solvency of every dollar of such assets. In addition their business is subject to the rigid and constant supervision of the State or Federal Government, or both, and their solvency at all times is a mandatory requirement for doing business. Such a class of assets is, of course, clearly distinguishable from the ordinary run of notes and accounts. Of course, notes held by individuals, firms and corporations are, sometimes, equally well secured; but when we treat them as a class such statement does not hold good.

While our State Constitution requires uniformity and equality in taxation, no one has ever believed that either could be attained as a practical matter. The constitutional provision is a statement of an ideal, and is implemented by numerous statutes, all seeking to put into practice such ideal so far as is humanly possible. But do all we can, and attempt as rigidly as we may to enforce such statutes, we will fall far short of attaining equality, uniformity and justice in levying taxes. In the first place, assessors often deliberately fail to perform their full duty; but their most sincere effort to perform such duty would not result in an assessment fair to everyone. For example, who can know the exact value of an oil or gas well; or, to confine ourselves to Class I property, the value of a herd of cattle, or a flock of sheep, or agricultural implements; or how much will be realized from the notes and accounts of any business or individual. No one can escape the variations of financial fortune, and as to every note and account there is some risk. Then, delays in and costs of collection must be considered. No one can fix with certainty the real value of the great mass of property of all types and classes, and a certain amount of estimate and conjecture is inevitable.

In these circumstances assessors are warranted in adopting some reasonable plan for the valuation of types of property, the value of which may be affected by the considerations above mentioned. As to notes and accounts, assessors do not have the facilities to investigate the financial standing of debtors, and if they had, perfection could not be attained. They are driven to adopt some standard, and if they do so, and it is a reasonable one, the results of its application cannot be considered as a discrimination against owners of other property, the value of which can be more definitely determined, and is largely fixed by its very nature. The results may not be entirely fair to other taxpayers. In many instances notes and accounts worth full value may be assessed at less than their value and, in individual cases, a clear case of discrimination may be shown to exist. But this does not rise to the importance of general discrimination as between property of different types, even that within the same legal classification. It must be agreed that every effort should be made to avoid such instances of discrimination, and the use of the plan adopted by the Assessor of Kanawha County, and other assessors throughout the State, should be limited to cases where no better plan can be devised. Every assessor should feel the obligation to prevent discrimination between taxpayers to the fullest extent possible.

On the record before us, we do not believe a clear case of discrimination has been shown. No one contends that the property of the appellants has been assessed in excess of its true and actual value. Appellants would not be permitted to do business if their respective assets were less in value than that reported to the assessor. State and Federal authorities would intervene, if such a situation existed. As has been stated above, the assets of each of the appellants were originally selected after the most rigid test as to its value, and care taken to guard against the fluctuation in values of properties securing such assets. Clearly, as relates to safety and security it is a different type of property from the ordinary note or account. Why, therefore, should we be asked to reduce an assessment below its true value, merely because as to other property,

the value of which is uncertain, and by reason of its character cannot be accurately determined, assessing officers have, in good faith, adopted a plan for arriving at an estimated value?

Then, what evidence is there in the record that Class I intangible property, not covered by the type of property owned by the appellants, is assessed at less than its true value. Of course, appellants cannot, on account of practical difficulties, show that it is assessed at less than its value, and, for the same reason, the assessor cannot show the opposite. Neither the assessor nor the appellants know, or can by any reasonable effort ascertain, the true and actual value of the intangible Class I property in Kanawha County, represented by the common run of notes and accounts. If this be true, how can it be claimed that any discrimination was practiced. We do not have a case where the true and actual value was ascertained and a discount allowed from that value; but rather a case where the discount was allowed, particularly as to intangibles, in an effort to reach the true value. The more or less arbitrary allowance of the discount as to notes and accounts may have been an erroneous exercise of the duties of the assessor. We think it was. Some plan which would take into account the difference between the secured notes and the unsecured notes and accounts could, and should be devised; but mere error of judgment as to the plan adopted is not sufficient to establish discrimination, where the plan, though imperfect, is adopted in a good faith effort to secure fair and equitable assessment, and equality and uniformity in taxation.

Recent radical changes in our tax system, brought about by the adoption of the tax limitation amendment, Section I of Article X of our Constitution, whereby property is classified, gives rise to the suggestion that once property has been classified, there can be no further distinction as to property within a given classification. Whether there can be such distinction is perhaps dependent on the character of the property involved. Each of the four classifications of property for tax purposes includes property of

different types, for the ascertainment of the value of which different methods are employed. In the very nature of things this must be true. The Constitution plainly says that the value of all property for tax purposes shall be ascertained "as directed by law". Who gives the direction? Obviously, the sole law-making authority, the legislature. In respect to building and loan and federal savings and loan associations, as well as other types of property, the legislature has given specific direction, and as to other types of property the directions are more general. We do not doubt the inherent and constitutional power of the legislature to give these directions, so long as they are designed to provide a method in keeping with the aim to tax property equally and uniformly, as required by our Constitution. So far as concerns our State Constitution, we think the question is set at rest by the decision of this court in *Charleston & Southside Bridge Co.* v. *Kanawha County Court, supra.* That case was decided in 1896, when there was no classification of property for tax purposes, and uniform tax rates, in each taxing district, applied to all property. However, Section I of Article X of the Constitution, as it then was, contained the same provisions with respect to equality and uniformity as those contained in the present Constitution. In that case the plaintiff was the owner of a toll bridge, and the legislature had provided a particular method for the assessment of toll bridges and ferries. Points 2, 3, and 4 of the syllabus read as follows:

> "2. The legislature has power to prescribe the method by which the valuation of any class of property may be ascertained, and, where the value of the same class of property is ascertained throughout the state in the same manner, such valuation cannot be regarded as unconstitutional for lack of uniformity or equality.
>
> "3. The Constitution prescribes what property is to be taxed, and the legislature prescribes the manner in which it shall be taxed, which mode of taxation shall be equal and uniform as to all classes of property.

"4. A tax upon all business of the same class, which is uniform as to that kind of business, is not unconstitutional."

We know of no subsequent case which in any way departs from that decision. It was cited with approval in *Christopher* v. *James*, *supra*. The later classification of property does not, in our opinion, call for any departure from the principles therein pronounced. We think they are applicable to our present tax system.

Appellants strongly rely upon the case of West Penn Power Co. v. Board of Review and Equalization, 112 W. Va. 442, 164 S. E. 862. That case was decided in June, 1932, and related to the assessment of real estate, a specific type of property. It was there held, relying largely on *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 340, that "Under the Fourteenth Amendment of the Constitution of the United States, it is the right of a taxpayer whose property is taxed at one hundred per centum of its true and actual value to have his assessment reduced to the percentage of the value at which other properties of the same class in the same governmental unit of taxation are taxed, even though the statute requires that all property be taxed at its true and actual value." Many other cases decided by the Supreme Court of the United States could be cited in support of this holding, among which are: *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Louisville & Nashville Ry. Co.* v. *Greene*, 244 U. S. 522; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Bohler* v. *Calloway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239. But the force and weight of these decisions, as applied to the present controversy, is largely, if not entirely, nullified by the recent decision of the same Court in *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning*, 310 U. S. 362, 84 L. ed. 1254. In that case it was held that, "The Equal Protection Clause of the Fourteenth Amendment permits a State to classify the property of railroads and other public utilities separately from other

property and to tax it higher", and also, "Where a State for many years systematically assessed the property of railroads and other utilities at full cash value and all other kinds of property at less than cash value, held that the practice was the 'law' of the State, within the meaning of the Equal Protection Clause of the Fourteenth Amendment, although uniformity of taxation was commanded by the state constitution, and although it were true that the tax in question was sustained by the State Supreme Court by a resort to fiction." We understand this case to hold that none of the cases decided by the Supreme Court of the United States, cited above, were meant to prevent a state from applying different yardsticks to different classes of property; and, applying this principle, we would say it would be no violation of the equality and uniformity clause of either the State or Federal Constitution to apply a different yardstick to different types of property in the necessary ascertainment of the value thereof for tax purposes. The cases last cited above are distinguished, and we think that, as the law now is, appellants can find no support for their contentions under the Fourteenth Amendment of the Federal Constitution. The *Browning* case involved the assessment of a railroad, but the principle announced applies to the assessments of all types and classes of property by a state or its political subdivisions. Under that decision, it is doubtful whether the ruling of this Court in the *West Penn* case could now be sustained by sole reliance on the Fourteenth Amendment.

We are not persuaded that the ruling in the *West Penn* case, basing the same on our State Constitution, requires us to hold with the contention of the appellants in the case at bar. As stated above, that case involved real estate. There was clear discrimination, because it was apparently admitted that, in assessing real estate in Brooke County, approximately twenty per cent was taken from the true and actual value thereof, and the assessment fixed at eighty per cent of such value; whereas, as to the property of the West Penn Power Company, that reduction was not made, and its real estate was assessed at its true and actual value. There could, of course, be no just excuse for that character

of discrimination, and the only question before the Court was whether the legislative direction, to assess property at its true and actual value, should or should not give way to the constitutional requirements of equality and uniformity. It was decided that, under the Fourteenth Amendment of the Federal Constitution, the constitutional requirements were paramount, resulting in a reduction of the West Penn Power Company's property to eighty per cent of its value. It would, perhaps, be out of place to discuss the wisdom of that decision, because we do not think it controlling in the case at bar. It may be that the principles of that case are sound, and that under our Constitution, without reliance on the Fourteenth Amendment, we should adhere thereto. But where do they lead us? An assessor violates the law, and a portion of the taxpayers receive an advantage from such violation. When this occurs, other taxpayers naturally feel that they should be accorded the same treatment. Must the courts insist on, require and direct other violations of law by tax officials? Suppose next year the assessor of any county, or of all the counties of the State, decides to assess real and personal property of individuals at fifty per cent of its true and actual value, would not the owners of public utilities, banks, building and loan associations and federal savings and loan associations be entitled to the same treatment? Is it not time to find some remedy for this situation, other than one involving an appeal to the courts to enforce a system of assessments for tax purposes which is plainly in violation of the law as written? It would be refreshing, indeed, if some taxpayer, or group of taxpayers, would sponsor an effort to see that our tax laws are obeyed, rather than to take advantage of their open violation. It is not for this Court to point out ways by which regard for law may be required of public officials, but they exist. It is probably too much to expect that they will ever be used.

The case before us does not involve the assessment of real estate, but a type of property of a peculiar nature and as to which the legislature has exercised its power to direct how it shall be assessed, and as to which different methods of ascertaining values must be employed, even as between types of the same constitutional classification. The assessor, we may assume, has in good faith, made an effort to

ascertain the value of intangible property in Kanawha County, other than that owned by appellants. It is entirely different from a case where the same type of property, requiring the same methods of ascertaining the value, is involved, and where one taxpayer's property of the same type is assessed at its true and actual value and another taxpayer's assessed at a lower figure. It is understandable how a court in such a case might feel disposed to favor a taxpayer, even at the risk of encouraging violations of plain statutory law by taxing authorities. Discrimination in the assessment of property of the same type, in the same taxing district cannot be defended, and we do not mean to defend such a practice in any sense. We think money and solvent securities should be assessed at their face value, and we think the arbitrary practice of allowing a certain reduction from the face value of notes and accounts should be discontinued so far as possible, although we realize that some plan of estimating value must be followed in a great many instances. Our holding goes no further than this: What has been shown with reference to the assessment of intangible property in Kanawha County, of types other than that owned by the appellants, is insufficient to establish a case of discrimination, which would justify us in applying the principles announced in *West Penn Power Co. v. Board of Review and Equalization, supra.*

In view of the fact that the Legislature has given specific direction as to the assessment of the property of the appellants, and the assessments were made in conformity with such direction; and further that there has been no clear showing of discrimination, to the prejudice of the appellants, in the assessment of intangible property in Kanawha County, the order of the circuit court of said county, complained of, is affirmed.

Affirmed.

Code of West Virginia, 11-3-1:

> "All property shall be assessed annually as of the first day of January at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which

is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others. If at any time after the beginning of the assessment year, it be ascertained by the tax commissioner that the assessor, or any of his deputies, is not complying with this provision or that he has failed, neglected or refused, or is failing, neglecting or refusing after five days' notice to list and assess all property therein at its true and actual value, the tax commissioner may order and direct a reassessment of any or all of the property in any county, district or municipality, where any assessor, or deputy, fails, neglects or refuses to assess the property in the manner herein provided. And, for the purpose of making such assessment and correction of values, the tax commissioner may appoint one or more special assessors, as necessity may require, to make such assessment in any such county, and any such special assessor or assessors, as the case may be, shall have all the power and authority now vested by law in assessors, and the work of such special assessor or assessors shall be accepted and treated for all purposes by the county boards of review and equalization and the levying bodies, subject to any revisions of value on appeal, as the true and lawful assessment of that year as to all property valued by him or them. The tax commissioner shall, with the approval of the board of public works, fix the compensation of all such special assessors as may be designated by him, which, together with their actual expenses, shall be paid out of the

county fund by the county court of the county in which any such assessment is ordered, upon the receipt of a certificate of the tax commissioner filed with the clerk of the court showing the amounts due and to whom payable, after such expenses have been audited by the county court.

"Any assessor who knowingly fails, neglects or refuses to assess all the property of his county, as herein provided, shall be guilty of malfeasance in office, and upon conviction thereof, he shall be fined not less than one hundred nor more than five hundred dollars, or imprisoned in the county jail not less than three nor more than six months or both, in the discretion of the court, and upon conviction, he shall be removed from office."

Code of West Virginia, 11-3-14a (Ch. 118, Acts 1939, West Virginia Legislature):

"The capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value, according to the rules prescribed by this chapter, to such building and loan association or federal savings and loan association in the county, district and town where such association is located: Provided, however, That such shares and such accounts held by the United States government or any of its agencies shall not be included in determining the assessment. The real and actual value of such capital, represented by the market value of such investment shares and investment accounts aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain whether from any return made by such association to any officer of this state or the United States, from actual sales of such investment shares and investment accounts, from answers to questions by the assessor, as hereinafter provided, or from other trustworthy sources.

"The secretary or principal accounting officer of every such building and loan association and federal savings and loan association shall cause to be kept a complete record of all such investment shares and investment accounts, which shall be open to the inspection of the assessors of the counties, and the state tax commissioner or his assistants; and such secretary or officer shall answer under oath such questions as the assessor may ask him concerning the matters shown by such records and accounts, and concerning the value of such investment shares and investment accounts, and shall be subject to the same penalties for failure to do so, which are imposed by law upon individuals failing to answer questions which the assessor is authorized to ask. The taxes levied and assessed upon the capital of every such building and loan association and federal savings and loan association, represented by the true and actual value of such investment shares and investment accounts as aforesaid, shall be paid by such association in the same manner and at the same time as other taxes are required to be paid in such county, district and town.

"The real estate of any such building and loan association or federal savings and loan association shall be assessed as in other cases, and a proportionate share of such assessed value shall be deducted in ascertaining the market value of such investment shares and investment accounts, but in ascertaining the true and actual value of such capital as represented by such investment shares and investment accounts as aforesaid, the assessor shall take into consideration all earned reserves and undivided profits of any such association. And if the title to the building in which any such association does its business and the land on which such building stands is held by a separate corporation, in which any such association alone or together with another such association or bank company or companies own stock, and such building and land be assessed in such separate corporation, a proportionate share of the assessed value of such real estate

of such separate company shall be deducted in ascertaining the market value of the investment shares and investment accounts of such association. Every such association shall make a return to the assessor as of the first day of the assessment year."

Constitution of West Virginia, Article X, Section 1:

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value: except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be ap-

portioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing."

14th Amendment to the Constitution of the United States, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

# BRIEF FOR APPELLANT IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 400

In the Matter of Tax Assessments Against

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, AND EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION, *Appellants,*

vs.

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia, *Appellee.*

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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*Counsel for Appellants.*

W. ELLIOT NEFFLEN,
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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

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In the Matter of Tax Assessments Against

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, AND EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION, *Appellants,*

vs.

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia, *Appellee.*

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## BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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### HOW THE CASE AROSE

We have heretofore in our typewritten Statement as to Jurisdiction, at pages 7 to 12, inclusive, set forth how this controversy began, and the various legal steps by which it has progressed to this Court. However, because the appellee in its "Statement against Jurisdiction" p. 3, has alleged that appellants have proceeded "upon the erroneous theory that there has been a deliberate and systematic undervaluation of other species or classes of

property and an overvaluation of appellant's property" appellants feel they must again briefly review the proceedings.

At R. 50* the Assessor of Kanawha County, wherein appellants' businesses are located, testified that "in years previous to 1941" the method of assessment was to ascertain the value of the capital stock of appellants and other such companies and deduct 30% therefrom, the remainder being the figure used for assessment purposes. The Assessor further testified " . . . the 30% discount would be the more equitable assessment." (R. 51.)

Upon cross examination by the Attorney General, the Assessor of Kanawha County stated that he was familiar with the methods suggested by the Tax Commissioner for assessment of associations such as are appellants, and when directly asked if "that method does not produce an assessment of the true and actual value" (as required by the statute) stated, "I do not believe so" (R. 122), and gave his reasons.

When further asked by the Attorney General how he would assess the "*property*" of such associations, he answered: (R. 123) "Well, I would take the investment shares and investment account, figure their undivided profits and probably their reserve for contingency, and *allow 30% discount as an equalization factor* to other classes of property and other properties in the same class."

However, after the Legislature of West Virginia passed the statute whose validity is herein questioned, i.e. Code 11-3-14a† requiring that "The *capital* of every building

*All references to the Record or R. contained in this brief, refer to the printed record used before the Supreme Court of Appeals of West Virginia, which is a part of the transcript of record forwarded to the Clerk of this Court.

†Chapter ...., Article ..., Section ...

and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed it its true and actual value . . . ."‡ The appellee herein, Tax Commisisoner of West Virginia, ordered the Assessor of Kanawha County to make assessment at full and complete value of the capital stock of appellants, and to discontinue the allowance of discount of 30%, even though all other taxpayers still received at least a 30% discount in their assessments.

The assessments thus made were appealed to the County Court of Kanawha County, Ex-officio Board of Review and Equalization, a lay court, which reversed the assessments made by the Assessor at the order of the Tax Commissioner, after a full hearing was had, and testimony from all parties was heard. It was before this Court that the testimony contained in the printed record was taken. The reversal was specifically upon the ground that the appellants were taxed proportionately higher than other taxpayers, and therefore discriminated against, and reductions in the assessments were ordered, and the assessment was made as the Assessor stated above it should have been calculated.

An appeal to the Circuit Court of Kanawha County followed, which Court reversed the County Court, upon the ground that there was no legal discrimination if all building and loan associations were treated alike, even though there was an admitted discrimination against them as compared with all other taxpayers. An order was thereupon entered, reinstating the assessments made by order of the Tax Commissioner. After appeal to the Supreme Court of Appeals of West Virginia, this order was affirmed.

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‡All emphasis herein is supplied.

## VALIDITY OF STATUTE WAS INVOLVED BELOW, AND APPELLANTS WERE DISCRIMINATED AGAINST, AND THEIR FEDERAL RIGHTS VIOLATED

It is true that in the opinion of the Supreme Court, Judge Fox, who wrote it, attempted to demonstrate there was no discrimination against appellants. But R. 23 discloses that this Honorable Judge would have refused to grant the appeal in the first place (appeals in West Virginia are not as of right, but rest in the discretion of the Supreme Court), and it is a further fact that Judge Fox was the Tax Commissioner of West Virginia, up to the time he took his seat as a Judge of the Supreme Court of Appeals of this State, and with all due deference to the Judge, and with the very highest respect and admiration of his undoubted ability, it is suggested that in the instant case the language of his opinion is much more that of a Tax Commissioner than of a Judge of a Court of last resort. It is because of his opinion and decision, and the appellant's disagreement therewith, that this present appeal is prosecuted.

It seems rather circuitous for the Attorney General of West Virginia to state that there is no jurisdiction for this appeal, because the decision from which appellants are appealing, reversing a decision in their favor, says they aren't harmed or discriminated against.

The statute in question, as interpreted by the Tax Commissioner, and as applied by him to these appellants, in which interpretation and application he was sustained by the Supreme Court of Appeals of West Virginia, is invalid, is our respectful contention. It is this interpretation of the statute, and its application to the appellants, and the sustaining thereof by the Court of last resort, which renders the statute invalid, and the reason for this appeal; and we submit this creates one of the requisite grounds for jurisdiction by appeal.

With all proper humility, may we be so bold as to suggest that Judge Fox and the Attorney General, who is counsel for the Tax Commissioner, are apparently either mistaken or are uninformed as to the provision of the statute whose validity is questioned. Throughout his opinion, Judge Fox speaks of a tax on the "intangible property" of these appellants. It is true that in *Charleston Federal Building & Loan Association* vs. *James*, 120 W. Va. 781; 200 S. E. 845, the Supreme Court of West Virginia, as related by Judge Fox on page 3 (typewritten) of his opinion, held that as to such building and loan associations, they were incorporated companies and "Therefore, their intangible and other personal property is subject to taxation."

But the instant statute, passed by the Legislature of West Virginia since the above decision is NOT a tax on such intangible or other property of any such association, but a tax on its *capital stock*, as represented by investment shares or accounts. The statute, after providing as above quoted, then goes on, "Provided, however, that such shares and such accounts held by the United States government or any of its agencies shall *not* be included in determining such assessment."

The statute then gets down to what we consider the meat or heart of it. "The real and actual value of such *capital*, represented by the *market value* of such investment shares and investment accounts as aforesaid should be ascertained according to the best information which the Assessor may be able to obtain . . .." whether from returns by the association, or from actual sales, from answers to questions by the Assessor, or from other sources.

Hence, the tax is one on the capital stock, less United States Government owned shares. It is not at all a tax on intangible or other personal property, and all the

language to this effect in Judge Fox's opinion is misguided, and in our opinion irrelevant and erroneous.

The Attorney General of West Virginia, is likewise in this same manner "off the beam." He talks of book value, face value, etc., of the *assets* of these appellants, and then how the true and actual value of such *assets* was arrived at. He overlooks the main point, that the problem was to determine the *value of its capital stock*, not the value of the underlying assets.

This became very apparent when the Attorney General, beginning on p. 4 (typewritten) of his "Statement Against Jurisdiction" attempts to show by figures there was no discrimination against appellants in the determination of their assessments.

Exhibit Wilkinson 1 (R. 185) was the revised computation of the assessment made by the Tax Commissioner's office, which the Assessor of Kanawha County was directed to use (R. 48) for the assessed value of the capital of appellant, Charleston Federal Savings & Loan Association. An examination of that exhibit shows the shares at par value owned by the Association, and those owned by the United State Government, and the value of both together; other capital was then added in, and owned and assessed real estate was then deducted. Then the net value per dollar of invested capital was calculated by dividing the total value of par value shares into the other sum, arrived at as above stated, resulting in a figure of $1.049. Then the value of the shares owned *only* by the Association (the statute provided government owned shares were to be excepted) was multiplied by this net value of invested capital, and the resulting amount, without any 30% deduction, was the figure arrived at for assessment purposes.

This is the formula devised by the Tax Commissioner for finding the assessed value of the capital as required

by statute. These appellants, in the Courts below, urged that certain of the items of "other capital" be excluded in ascertaining market value, and both below and here contend that the 30% deduction must be allowed or discrimination exists.

But the Attorney General, in his calculation, as did Judge Fox in his opinion, ignored the purpose and intent of the statute to *tax capital*, and speak of a tax of assets and personal property, and we submit this is entirely unconnected with any attempt to arrive at an assessed value of capital.

On Page 4 (typewritten) of the Attorney General's Statement, he uses the figures given in Exhibit Wilkinson 2 (R. 187), (the return prepared and filed by appellant Charleston Federal Savings & Loan Association, R. 49) and from it takes out the value of the real estate loans, and the amount of cash, and allows the 30% deduction appellants insist is correct, and still arrives at a higher value for assessment purposes than does the Tax Commissioner. Of course, this is true so long as the Attorney General ignores that part of the statute which requires that the shares owned by the Federal Government be exempted in calculation of the assessment. Of the total shares of that association, as shown by Exhibit Wilkinson 1, (R. 185), a simple calculation will show that the Government owned 36.1%. If the Attorney General would deduct that from his calculation, he would easily see how there was a discrimination even under his theory, as against the Charleston Federal Savings & Loan Association, because the actual assessment appealed from, as made by the Tax Commissioner, was $921,180.00, and after deducting the United States Government's proportionate share of the underlying assets (used by the Attorney General for an example to show no actual discrimination) the proper value for assessment under this formula, would be $606,812.16.

This is less than the figure of $639,030.00, which was the value fixed by the County Court for the Charleston Federal Savings & Loan Association, and which we herein contend is the correct figure.

So, using the Attorney General's own figures, *but allowing the deduction required by the statute*, there is shown to be an absolute case of discrimination.

Like deductions for Government owned shares, made in the other examples used by the Attorney General, would produce similar results, and need not be here repeated.

While the Attorney General (p. 8; typewritten) contends certain facts were found by the Supreme Court of West Virginia, which may be true, yet it is from these findings, based upon an erroneous understanding of the statute, and reversing findings of fact made by the County Court, whose duty *alone* it is to find facts, that appellants are appealing.

The Supreme Court of Appeals of West Virginia, in its opinion, urges as one of the main reasons for sustaining the Court below, that even if there were discrimination shown against these taxpayers, that their assessment was correctly calculated as required by the statute; and that because other taxpayers were given a lower tax or tax assessment, either by error or by intent, that the means of correction was to find a way to raise the tax assessments or taxes of the others; and it was improper to lower the assessment of the one thus discriminated against, in order to equalize all. In other words, then, the doing of another wrong, would not make a right. (See opinion of Judge Fox, typewritten, on third to last and second to last pages.)

But case after case holds this decision of the Supreme Court of West Virginia is erroneous, and in such a situation, it being impossible as a practical matter to raise

all other assessments, and since discrimination does exist, it can only be corrected by the Courts ordering the lowering of the assessment of the one who appealed therefrom and who is discriminated against, to the level of all other taxpayers.

Such was the direct holding of this Court in the case of *Sioux City Bridge Co.* vs. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340; and *Greene* vs. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, both of which are quoted from directly upon this point at p. 23 (typewritten) of these appellants Statement on Jurisdiction.

## THERE IS A SUBSTANTIAL FEDERAL QUESTION IN ISSUE, AND ALSO A PROCEDURAL RIGHT TO APPEAL

Counsel for the Appellants are advised by the Clerk of this Court, and the Clerk of the Supreme Court of Appeals of West Virginia, that to their best knowledge, this is the first case in which an appeal has ever been allowed by the President of the latter Court.

Naturally, counsel are gratified that theirs should be the first case so to be allowed, and thus a precedent of many years overruled, and a new and, we believe, sensible view of the law taken.

This matter of appeal was presented orally to the Honorable H. H. Rose, President of the Supreme Court of Appeals of West Virginia, by counsel, together with all the required and necessary papers, including the statement on jurisdiction on July 13, 1944. Thereafter, for a period of nine days, counsel met with the Judge practically daily, to present authorities and arguments first, why the case was a proper one under the rules and statutes in which to have an appeal allowed; and secondly, that the Judge had the power and right to grant the appeal.

The case was considered at great length by the Judge, who independently made an exhaustive research of the law and cases upon the problem presented, and when the appeal finally was granted, it was only after the Judge had thoroughly considered all phases of it.

A "Memorandum" of opinion was then written by the Judge, and filed with the Clerk of this Court, which we include herein, as an appendix, and which we submit is very pertinent and important.

That opinion shows that the Judge was thoroughly conversant with the statute under which the appeal must be taken, the rules of this Court concerning appeals, and the law and cases thereon, and had considered them all.

A reading of that opinion will disabuse this Court of any idea that the Federal question, as alleged in the motion to dismiss, was either frivolous or insubstantial; that the validity of a state statute was not involved or concerned, and not contended to be invalid.

We respectfully submit that the presiding Judge below, who sat upon the case, was thoroughly familiar with it and with the record, and had studied all of the laws and cases upon which depended his decision as to whether to grant the appeal, and his opinion shows that this is properly a case in which an appeal was properly granted. We earnestly insist that this Judge would not have allowed this appeal, and thus created new law in West Virginia, by so doing, had appellants not have presented a case which fully warranted the allowance of the appeal.

Apparently, the Attorney General of West Virginia seems to believe that certiorari lies but an appeal does not, but we respectfully submit that in this instant case there exists every single factor required for the allowance of an appeal, and that while possibly certiorari might *also* lie, that beyond possibility of reasonable doubt, an appeal does and did lie.

Appellants therefore pray that the "Motion to Dismiss" may be disregarded, and the case heard and determined upon the merits.

Respectfully submitted,

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, and EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION, *Appellants*.

By: J. CAMPBELL PALMER, III,
*Attorney for Appellants*.

W. ELLIOT NEFFLEN,
KOONTZ & KOONTZ.

# APPENDIX

## No. 9501

In the Matter of Tax Assessments Against

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, and EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION,

v.

GEORGE P. ALDERSON, STATE TAX COMMISSIONER, ETC.

## MEMORANDUM

I

ROSE, *President:*

On the 13th day of July, 1944, the above plaintiffs presented to me, as President of the Supreme Court of Appeals, their petition praying for an *appeal* (not a writ of certiorari) to the Supreme Court of the United States from the final judgment of this Court in this case.

On the 21st day of July, 1944, I awarded the appeal as prayed for, without supersedeas, to take effect upon the giving of bond in the penalty of one thousand dollars conditioned for the prompt prosecution of the appeal, and the payment of costs in case of dismissal.

## II

The appeal was sought under Section 237(a) of the Federal Judicial Code (Section 344(a), Title 28 U. S. C. A.), which provides, *inter alia*, that:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; *or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.* The appeal shall have the same effect as if the judgment or decree has been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

It will be observed that this provision does not apply to certiorari, which is the ordinary method of obtaining review of a judgment in the Supreme Court of the United States. It will further be observed that the appeal lies only where the judgment or decree sought to be reviewed is *adverse* to some provision of the Constitution, a treaty, or a law of the United States.

This statute can be traced back to 1789 substantially in its present form in its main features, and consistently to this day the Supreme Court has held that, within the narrow zone in which this section gives the right of appeal (formerly writ of error) *lies, as a matter of right and is not awarded for error. Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090; *Ireland* v.

*Woods, Commissioner*, 246 U. S. 323, 38 S. Ct. 319, 62 L. Ed. 745; *Philadelphia & Reading C. & I. Co.* v. *Gilbert*, 245 U. S. 162, 38 S. Ct. 58, 62 L. Ed. 211; *Brown* v. *McConnell*, 124 U. S. 489, 8 S. Ct. 559, 31 L. Ed. 495.

Point 1 of the syllabus in *Ireland* v. *Woods, Commissioner, supra*, reads:

> "*The writ of error is allowed as of right*, in the cases designated therefor by the statute, when the federal question presented is real and substantial, and an open one in this court; but certiorari is granted or refused by this court in the exercise of its discretion."

And in *Philadelphia & Reading C. & I. Co.* v. *Gilbert*, *supra*, Van Devanter, Justice, speaking of the above-quoted statute, says:

> "The difference between the two modes of securing a review, as contemplated by the statute, lies in the fact that a *writ of error is granted as of right*, while a writ of certiorari is granted or refused in the exercise of a sound discretion."

In *Memphis Gas Co.* v. *Beeler*, *supra*, Chief Justice Stone says:

> "The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an *appeal as of right* whenever the prescribed conditions have not been rigorously fulfilled."

## III

Of course, this appeal must be based upon a defense presented in good faith and upon substantial grounds. It will not be awarded where no question is raised except one which has been clearly adjudicated by previous decisions

of the Supreme Court. *Missouri Pac. Ry. Co.* v. *McGrew Coal Co.*, 256 U. S. 134, 41 S. Ct. 404, 65 L. Ed. 864; *Miller & Lux* v. *Sacramento & San Joaquin Drainage District*, 256 U. S. 129, 41 S. Ct. 404, 65 L. Ed. 859; *Minneapolis St. Paul & S. S. M. Ry. Co.* v. *C. L. Merrick Co.*, 254 U. S. 376, 41 S. Ct. 142, 65 L. Ed. 312; *Zucht* v. *King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194; *Quinn* v. *United States*, 260 U. S. 438, 43 S. Ct. 185, 67 L. Ed. 339.

Nor will an appeal be granted where the federal question is merely frivolous, formal, moot, or otherwise unsubstantial. *Parker* v. *McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051; *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 255 U. S. 445, 41 S. Ct. 373, 65 L. Ed. 723; *Missouri & Pac. Ry. Co.* v. *Clarendon Co.*, 257 U. S. 538, 42 S. Ct. 210, 66 L. Ed. 354; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652, 34 S. Ct. 767, 58 L. Ed. 1139; *Wilson* v. *North Carolina*, 169 U. S. 586, 18 S. Ct. 435, 42 L. Ed. 865.

## IV

In the present case, from the beginning—before the Board of Equalization and Review, before the Circuit Court, and before this Court—the petitioners continuously, in strict form, and vigorously, have insisted that the assessments made against their property violate the Fourteenth Amendment of the Federal Constitution, which provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction equal protection of the laws."

The sections of our State statutes which are claimed to be repugnant to this provision of the Constitution are as follows:

(1) Code, 11-3-1, which provides that:

> "All property shall be assessed annually as of the first day of January at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale. * * *;

and (2) Code, 11-3-14a, which provides that:

> "The capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value, according to the rules prescribed by this chapter, to such building and loan association or federal savings and loan association in the county, district and town where such association is located: * * *."

It is said that these provisions discriminate between corporations of the character of the plaintiff, on the one hand, and other property owners, on the other, in violation of the above-quoted provision of the Fourteenth Amendment to the Federal Constitution, and are therefore invalid.

This Court held these statutes, as construed and applied by the Tax Commissioner and the Assessor of Kanawha County, to be valid. It would seem, therefore, that in this case there "is drawn in question the validity of a statute" of a state "on the ground of its being repugnant to the Constitution * * * of the United States and the decision" has been "in favor of its validity", and that, therefore, the appeal lies, *not by reason of any error* in the decision of this Court, but by reason of the mere fact that the validity of the statute was called into ques-

tion, and its validity sustained. Section 344(a), Title 28, U. S. C. A. Indeed, in a tax assessment case almost exactly parallel to this case, the judgment of a state court has been reversed. *International Harvester Co.* v. *Wisconsin Department of Taxation*, --- U. S. ---, 64 S. Ct. 1060, 88 L. Ed. 1023.

The petitioners, therefore, would seem to have put themselves strictly within the statute entitling them to an *appeal as of right.*

V

Section 871, Title 28, U. S. C. A., provides that:

> "Writ of error from the Supreme Court to a State court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

(By act of January 31, 1928, as amended by the act of April 26, 1928, it is provided: "The writ of error in cases civil and criminal is abolished. All relief which prior to January 31, 1928, could be obtained by writ of error shall hereafter be obtainable by appeal." Section 861[a], Title 28, U. S. C. A.)

By Rule 36 of the Supreme Court of the United States, it is provided, *inter alia*, that:

> "* * * In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court."

(Counsel for petitioners states that he is informed by the Clerk of the Supreme Court of the United States that

cases have come to that Court under writs of error or appeal awarded by the chief justice or presiding judge of the courts of last resort from all states except three or four, of which West Virginia is one, and that only the court of New Jersey consistently refuses to award such writs.)

The following cases in the Supreme Court of the United States have been found, in which the appeal was awarded by the chief justice or presiding judge of the Court of last resort of a state: (Kansas) *Fiske* v. *Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108; (Oklahoma) *Longest* v. *Langford*, 274 U. S. 499, 47 S. Ct. 668, 71 L. Ed. 1170; (Nebraska) *Missouri Valley Land Co.* v. *Wiese*, 208 U. S. 234, 28 S. Ct. 294, 52 L. Ed. 466; (New York) *Harnor* v. *People of New York*, 170 U. S. 408, 18 S. Ct. 631, 42 L. Ed. 1087; (Colorado) *Butler* v. *Gage*, 138 U. S. 52, 11 S. Ct. 235, 34 L. Ed. 869.

In the following state cases the granting of such appeal by a state judge is discussed in connection with certain subsidiary questions which arose after an appeal or writ of error to the Supreme Court of the United States had been granted by the chief justice or presiding judge of a state court of last resort: (North Carolina) *Seaboard Air-Line Ry. Co.* v. *Horton*, 176 N. C. 115, 96 S. E. 954; (California) *Greely* v. *Townsend et al.*, 25 Cal. 604; (California) *Terry* v. *Southern Pacific Co.*, 176 Cal. 584, 169 P. 354; (Kentucky) *Ohio River Contract Co.* v. *Gordon*, 172 Ky. 404, 189 S. W. 451.

Section 5399 Vol. 10 Cyclopedia of Federal Procedure, 2nd Ed., reads:

> "The principle that the petition for appeal should be presented to and allowed by the proper judge of the court below rather than to a Justice of the Supreme Court applies to appeals from state courts."

And in Section 5508 of Vol. 11 of the same work is found the copy of an order allowing such appeal by the presiding judge or chief justice of the court of last resort of a state.

In no case found has the right or power of the presiding judge or chief justice of a state court of last resort to issue such appeal been disputed, or even discussed. That right and that power seem to be universally conceded.

## VII

Believing that the petitioners are entitled to the appeal *as of right*, not for error, but by reason of the questions raised, and further that the president of this Court has the power to grant the appeal, I conclude that the writ cannot properly be denied. A judge, empowered to award an appeal, may not lawfully, refuse the application of a litigant who is entitled thereto as of right.